Supreme Court, U.S.
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No. 05-1641

IN THE

Supreme Court of the United States

BERRELL FREEMAN,
Petitioner,

v.

GERALD A. BERGE, *et al.*,
Respondents,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that food deprivation resulting from an inmate's refusal to follow various prison regulations does not constitute punishment within the meaning of the Eighth Amendment, even where the deprivation included at least two periods lasting eight or more consecutive days?

2. Whether the court of appeals erred by failing to draw all reasonable inferences in petitioner's favor in reviewing the district court's grant of the prison officials' post-trial motion for judgment as a matter of law?

3. Whether the court of appeals erred in applying the objective component of the deliberate indifference test as set out by this Court?

4. Whether prison officials may withhold all food from an inmate under any circumstances and, if so, for how long?

PARTIES TO THE PROCEEDING

Petitioner is Berrell Freeman.

Respondents are Gerald A. Berge, Peter Huibregtse, Brad Hompe, Gary Boughton and John Sharpe.[1]

[1] John Sharpe and Gary Boughton were included on the list of appellees in the caption of this case before the United States Court of Appeals for the Seventh Circuit and, as such, are included here as respondents pursuant to Supreme Court Rule 12.6. However, John Sharpe was voluntarily dismissed before trial and the jury did not find Gary Boughton liable. Petitioner has not sought, and does not here seek, review of any judgment relating to Mr. Boughton or Mr. Sharpe.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Berrell Freeman respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 441 F.3d 543 (Pet. App. 1a). The district court's opinion and order is reported at 2005 WL 1168311 (Pet. App. 8a).

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a

judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Berrell Freeman is a prison inmate who, at all times during these proceedings, has been incarcerated by and in the custody of the Wisconsin Department of Corrections (DOC) at the Wisconsin Secure Program Facility ("WSPF") (a facility formerly known as "Supermax") in Boscobel, Wisconsin. Freeman brought suit under 42 U.S.C. § 1983 against Gerald Berge, the Warden at WSPF during the period relevant to this case, Peter Huibregtse, the Deputy Warden at WSPF, and Brad Hompe, the Unit Manager responsible for Freeman's unit. Pet. App. 10a. Freeman alleged violations of his Eighth Amendment right to be free from cruel and unusual punishment. *Id.* at 11a. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

Although several of Freeman's initial claims were dismissed, Freeman was permitted to go to trial on his claim that defendants had punished him for violations of various prison rules by withholding his meals for days, and in some cases, weeks at a time. Pet. App. 11a. At trial, Freeman presented evidence that he had been denied meals on hundreds of occasions over a period of about 27 months because he had refused to put shorts or trousers over his underwear or turn on his light in accordance with the prison's meal delivery policy, had worn a sock around his head, refused to clean his cell or slept through announcement of a meal. *Id.* Freeman missed meals for three days in April 2001; he missed approximately 242 meals between July 6, 2001 and November 3, 2001; he missed all meals for two consecutive days in April 2002; he missed meals for at least eight consecutive days in June through early July 2002; he missed meals for several consecutive days in February 2003; he missed meals for three consecutive

days in March 2003; he received only his breakfast meal each day from May 18 until June 5, 2003; he missed all meals for two periods in September 2003, one lasting two days and one lasting four; and he missed all meals for at least eight straight days during October 2003. *Id.*

Freeman testified that, as a result of officials' withholding his meals, he lost between 40 and 50 pounds. He began experiencing massive headaches, shortness of breath, dizziness, muscle weakness, bone pain and difficulty defecating. Pet. App. 11a; Tr. 1 A 61-62, Tr. 1 B 11:1-9. Freeman testified that "[e]verything you taste gets messed up and stuff starts smelling funny," and that the muscle weakness became so acute that he requested to have his mattress on the floor so that he did not have to stand up. Tr. 1 A 61:7-10. Freeman also told the jury that he coughed up blood and began seeing and hearing things. Tr. 1 A 61-62.

Freeman testified that he did not refuse his meals; in all instances, he wanted to eat, but was denied his meal. Tr. 1 A 40:18-19. Freeman complained to prison officials of his situation on a number of occasions, but his complaints were dismissed or ignored. Tr. 2 A 11-12, Tr. 2 A 14, Tr. 2 A 16-17.

The prison had a "hunger strike" policy requiring that health services be notified if an inmate missed nine consecutive meals. Tr. 1 B 72-73. Although Freeman testified that he missed meals for at least eight consecutive days in July 2002, there was no evidence that the prison's policy was put into action at that time. With regard to the other eight-consecutive day period, there was no evidence that anyone saw Freeman until he had missed at least fourteen consecutive meals and even then, he was not seen by a doctor and was not provided with food. Tr. 4 B 48.

A jury found Berge, Huibregtse and Hompe liable for their deliberate indifference to a substantial risk of serious harm placed upon Mr. Freeman while in their custody. Pet. App. 11a-12a, 19a-20a. The jury awarded Freeman $50,000 in compensatory damages and $400,000 in punitive damages against each of the three defendants. *Id.* at 12a, 21a-22a.

After trial, Berge, Huibregtse and Hompe renewed their motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(b) and moved, in the alternative, for a new trial or a remittitur of the compensatory damages in the amount of $25,000. Pet. App. 12a. The district court granted defendants' motion, overturning the jury's verdict against each of the three defendants on the basis of the Seventh Circuit's decision in *Rodriguez v. Briley*, 403 F.3d 952 (7th Cir. 2005) and because the trial evidence "f[ell] short of establishing that plaintiff's course of conduct and defendants' response subjected plaintiff to a substantial risk of serious harm." Pet. App. 17a.[2] The court noted that Freeman "never reached the point of organ failure or came close to it" and "[t]here

[2] In granting the Rule 50 motion, the district court misconstrued Freeman's claim to be, at least in part, a facial challenge to the prison meal rule and, on that basis, held that judgment as a matter of law was appropriate on the basis of *Rodriguez v. Briley*, 403 F.3d 952 (7th Cir. 2005). Pet. App. 16a ("In light of the decision in *Rodriguez*, it is clear that this facial challenge to the policy is untenable."). However, Freeman's allegations raised only an as-applied challenge to the WSPF policy, challenging the extent and duration of the deprivation, which was properly considered and decided by the jury. Pet. App. 19a-20a, 24a-25a; *see also* Tr. 1 A 6 (wherein the district court stated its understanding of the issue before the jury: "The jury is going to decide whether in this situation, in this set of facts, it was legal or illegal for the defendants to withhold food, and whether it [the policy] was constitutional in other cases just isn't appropriate."); Tr. 3 30:4-5 (wherein petitioner's counsel argued in closing that "[i]t's not the reasonableness of the rule itself. It's the implementation here.").

was no evidence that he became psychotic or suffered any other serious mental reaction from his lack of food" and that, therefore, the jury's verdict could not sustained. *Id.* at 17a-18a.

The Seventh Circuit affirmed. Judge Posner, writing for the panel, held that "[b]ecause to an overwhelming degree Freeman's food deprivation was self-inflicted, even if not 100 percent of it was, and the record contains no evidence that he experienced real suffering, extreme discomfort, or any lasting detrimental health consequences, the judgment for the defendants must be, and it is, [affirmed]." Pet. App. 7a.

REASONS FOR GRANTING THE PETITION

I. The United States Court Of Appeals For The Seventh Circuit Decided An Important Federal Question In A Way That Conflicts With Controlling Decisions Of This Court.

In affirming the district court's grant of judgment as a matter of law in favor of the prison officials, the Seventh Circuit failed to follow this Court's established jurisprudence in two respects. First, the court of appeals' determination that Freeman was not punished within the meaning of the Eighth Amendment fundamentally conflicts with this Court's long line of Eighth Amendment precedents. Second, the court of appeals failed to follow this Court's well-established precedents relating to a district court's decision to overturn a jury verdict by granting a motion for judgment as a matter of law. Because the Seventh Circuit's analysis was severely flawed in both regards, the Court should grant this petition pursuant to Supreme Court Rule 10(c).

A. The Panel's Determination That There Was No "Punishment" Conflicts With This Court's Eighth Amendment Precedents.

The court of appeals focused exclusively on the question of whether the deprivation of petitioner's meals in and of itself constituted Eighth Amendment punishment. That analysis ignored the fact that petitioner has been subject to Eighth Amendment "punishment" from the first day he was locked up in a Wisconsin prison. And a long line of this Court's Eighth Amendment cases required respondents to provide him with food and the basic necessities of life during all times he was subject to that punishment.

It is well established that a complete deprivation of food violates an inmate's constitutional right to be free of cruel and unusual punishment. For example, in *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), this Court held that "the Eighth Amendment places restraints on prison officials," such as against excessive force, and further

> imposes duties ~~on these~~ officials, who must provide humane conditions of confinement; prison officials must ensure that inmates *receive adequate food*, clothing, shelter, and medical case, and "must take reasonable measures to guarantee the safety of the inmates."

Farmer, 511 U.S. at 832 (1994) (citations omitted) (emphasis added). Although "[t]he Constitution 'does not mandate comfortable prisons,'" prison officials are charged with maintaining conditions that do not "pos[e] a substantial risk of serious harm" to the inmates in their custody. *Id.* at 832, 834.

Similarly, in *Wilson v. Seiter*, 501 U.S. 294 (1991), this Court held that it would be an Eighth Amendment violation to deny a prisoner an "identifiable human need such as food." In *Wilson*, this Court indicated that the determination of whether "punishment" has taken place is built into the determination of subjective intent:

> The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element

> must be attributed to the inflicting officer before it can qualify.[3]

Id. at 300.

In *Hutto v. Finney*, this Court evaluated the use of "grue"—a "substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture into a pan." 437 U.S. 678, 683 (1978). Prisoners on this diet received fewer than 1,000 calories a day. *Id.* According to the Court:

> A daily allowance of 2,700 calories is recommended for the average male between 23 and 50. National Academy of Sciences, Recommended Dietary Allowances, Appendix (8th rev. ed. 1974). Prisoners in punitive isolation are less active than the average person; but a mature man who spends 12 hours a day lying down and 12 hours a day simply sitting or standing consumes approximately 2,000 calories a day.

Hutto, 437 U.S. at 683 n.7. This Court found that "[a] filthy, overcrowded cell and a diet of 'grue' might be

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[3] The Court went on to quote the author of the panel opinion in this case:

> As Judge Posner has observed:
>
> "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century.... [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985." *Duckworth v. Franzen*, 780 F.2d 645, 652 (CA7 1985), cert. denied, 479 U.S. 816, 107 S. Ct. 71, 93 L. Ed. 2d 28 (1986).

Wilson v. Seiter, 501 U.S. 294, 300 (1991).

tolerable for a few days and intolerably cruel for weeks or months." *Id.* at 686-87.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), a case in which this Court held that use of a "hitching post" violated Eighth Amendment standards, the Court held that it was established law that an officer's temporary denial of water to a prisoner who refused to do his share of work assigned to a farm squad "should not be viewed as punishment in the strict sense, but instead as necessary coercive measures undertaken to obtain compliance with a reasonable prison rule," but that "a violation [would] have occurred if the method of coercion reached a point of severity such that the recalcitrant prisoner's health was at risk." *Id.* at 743.

The Seventh Circuit's determination that petitioner was not "punished" ignores the fact that petitioner was at all relevant times being imprisoned by the State of Wisconsin *as punishment for his crimes*. This Court's Eighth Amendment jurisprudence required the defendant officials to provide petitioner with food during his incarceration. Whether the deprivation of petitioner's meals did or did not constitute *additional* punishment ultimately does not matter under the Court's precedents.[4]

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[4] The court of appeals' focus on the penological justifications for the prison's meal delivery rules is reminiscent of the *Turner* test applied by this Court in other constitutional contexts, wherein a prison regulation claimed to infringe an inmate's constitutional rights may be upheld if it is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). This Court has explicitly stated, however, that such a test is inapplicable in the Eighth Amendment context. *See Johnson v. California*, 543 U.S. 499, 511 (2005) ("[W]e have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the 'deliberate indifference' standard, rather than *Turner's* 'reasonably related' *(footnote continued...)*

The Seventh Circuit failed to even acknowledge, let alone properly apply the *Farmer* line of cases, instead choosing to find that unless there is evidence that an inmate is at death's door or suicidal, the "keys to the cupboard" argument controls the analysis. But that sets the bar far too high. Deprivation of "the minimal civilized measure of life's necessities," which creates a "substantial risk of serious harm" violates the Eighth Amendment under this Court's established precedent.[5]

B. The Panel Failed to Follow This Court's Precedents Relating to Review of a Grant of a Judgment as a Matter of Law Overturning a Jury Verdict.

The Seventh Circuit failed to follow this Court's precedents relating to proper appellate review of the grant of a motion for judgment as a matter of law following a jury verdict. Indeed, neither the Seventh Circuit opinion nor the district court opinion includes even a passing reference to a standard of review. *See* Pet. App. 1a-7a, 10a-18a. Both the district court and the court of appeals ignored the high standard required to overturn a jury's verdict based on a motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure and instead chose to reweigh the evidence put forth at trial to reach their preferred result.

(continued from previous page)
standard.") (citations omitted). Thus, to the extent the Seventh Circuit applied such a standard to petitioner's claim, its decision conflicts with the clear precedent of this Court.

[5] And so the jury was instructed. Pet. App. 25a. To the extent that the court of appeals based its ruling on a determination that the harm suffered by petitioner was not sufficiently serious, see Part IB.

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), this Court held that "[u]nder Rule 50, a court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Id.* at 149 (citing Fed. Rule Civ. Proc. 50(a); *Weisgram v. Marley Co.*, 528 U.S. 440, 447-448 (2000)). Although the court is to review all the record evidence, "the court must draw all reasonable inferences in favor of the nonmoving party and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150 (citations omitted). Further, this Court has made clear that determining credibility, weighing evidence, and drawing legitimate inferences from the facts are the role of the jury rather than the judge. *Id.* at 150-51 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)). The court is to disregard all evidence favorable to the moving party that the jury is not required to believe; "[t]hat is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.'" *Id.* at 151 (citations omitted).

Here the Seventh Circuit usurped the jury's role by proceeding with its own weighing of the evidence. For instance, the court of appeals opined that the "record contains no evidence that [Freeman] experienced real suffering, extreme discomfort, or any lasting detrimental health consequences...." Pet. App. 7a. The court stated:

> Twice Freeman did not receive a timely inspection and, as a result, on each occasion, went eight days straight without a meal. But there is no indication that his life or health was

> jeopardized. He lost 45 pounds over 31 months, but since he weighed 195 pounds at the beginning and is only 5 foot 6 inches tall he ended up closer to the normal weight for a person of his height than when he began. Not that that is a complete defense, as we indicated earlier. Because of the irregularity of his eating, he experienced unpleasant symptoms, such as blurred vision.

Pet. App. 6a-7a.

At trial, however, Freeman adduced evidence that he had missed hundreds of meals between April 2001 and October 2003 and that on at least two occasions he was not fed at all for periods exceeding a week. Pet. App. 10a-11a. Freeman testified that he began suffering from headaches, dizziness, difficulty breathing, difficulty defecating, and that he coughed up blood. Pet. App. 11a; Tr. 1 A 61. He testified that he began hearing and seeing things. Pet. App. 11a; Tr. 1 A 62:11. Freeman's medical expert, Dr. Linda Farley, also testified extensively about the deleterious effects of not eating and how quickly a person can be impacted by a lack of nutrition:

> [F]ood being absolutely essential to our functioning as an organism, even withholding food for 24 hours can use up the body stores of carbohydrates.
>
> The liver stores carbohydrates, so even within 24 hours, our carbohydrates are pretty much used up. And so then you go to the next 24 hours and the body begins to use its reserve of fat to supply the body's energy needs. And then if there's not much of that or as time goes on and food is withheld. ... I'm saying if

> hydration is still going on, as it was with Mr. Freeman, he was still drinking water, then the next thing is that the body, when the fat supplies are used up and the carbohydrate supplies were pretty much used up, then the body draws upon the muscles, the protein elements of the body itself.
>
> And this can cause all kinds of incredibly injurious things to our body function from weakness to low blood pressure to a lower metabolic rate, to other kinds of just symptoms that, such as were described that Mr. Freeman experienced, such as headaches, inability to— He described the inability to stand up and breathe properly and talk at the same time when he was without food for a period of time. So there's all kinds of massive kinds of ... deregulation of body functions.

Tr. 2 B 7-8. With regard to petitioner, Dr. Farley concluded: "Mr. Freeman, in periods of time, was deprived of adequate caloric intake, and judging by the weight loss which he suffered, which other people certainly noticed, it says to me that he was not receiving adequate nutrition for his size and weight and level of activity." Tr. 2 B 34:19-24.

The court of appeals also was of the opinion that petitioner was not punished. While acknowledging that denial of food is "certainly an unusual form of punishment nowadays," and that "in cases where it inflicts serious harm on a prisoner it is also cruel," the court of appeals discerned a difference "between food deprivation as a punishment" and "food deprivation as a consequence of a refusal to comply with a condition precedent to being fed." Pet. App. 2a, 4a.

As discussed in Part IA, the relevant "punishment" here was petitioner's incarceration in a state institution. But even if the proper inquiry was whether the extended deprivation of his meals was constitutional punishment in and of itself, there is hardly a bright line between "punishment" and "refusal." The issue of whether an inmate was "punished" necessarily depends upon the circumstances presented, and is inherently a fact question properly before the jury.[6]

Petitioner maintained throughout trial that he had never refused a meal, but that in all instances, the prison officials had subjected him to punishment for his failure to follow prison policy. Tr. 1 A 20:6-12, Tr. 1 A 40:18-19, Tr. 2 A 11-12, Tr. 2 A 14, Tr. 2 A 16-17, Tr. 2 A 102, Tr. 3 30:2-10. The meal delivery policy set out in the WSPF Inmates' Handbook requires inmates to stand in the middle of the cell with the light on and pants on in order to receive a meal. T. 1 B 43-44. Petitioner was denied meals many times because he did not have his pants on as required. Tr. 1 A 40:15-22, Tr. 1 A 41:1-9, Tr. 1 A 43:10-44:12, Tr. 1 A 44:18-45:5, Tr. 1 A 50:20-51:10, Tr. 1 A 51:24-25. Petitioner was also denied his meals for a variety of other reasons: he testified he was denied meals because he did not clean his cell, Tr. 1 A 45:6-16, Tr. 1 A 48:7-16; for wearing a sock around his head, Tr. 1 A 44:5-6, Tr. 1 A 48:22-49:10, Tr. 1 A 51:16-

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[6] The punishment inquiry relates to the subjective component of the Eighth Amendment analysis—the second necessary component—which requires that officers acted with a "sufficiently culpable state of mind." *Wilson*, 501 U.S. at 298. This Court in *Farmer* indicated that the knowledge requirement relative to deliberate indifference is a question of fact for the jury, opining that a factfinder "may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842.

25; for washing his hands instead of being in the middle of the cell; for standing by the television; or for sleeping through or not otherwise hearing an announcement of the meal, Tr. 1 A 54:14-22, Tr. 1 A 55:3-56:2. Throughout the trial, petitioner urged the jury to find that these deprivations constituted punishment. Tr. 1 A 16:21-24, Tr. 1 A 17:9-21, Tr. 1 A 19:15-20:12, Tr. 3 13:13-14:25; Tr. 3 30:3-15.

Defendants, on the other hand, maintained that they had not *punished* petitioner by withholding his food, but instead, that petitioner had *refused* his meals by failing to comply with the rules. Tr. 1 B 53-54, Tr. 1 B 67:17-25, Tr. 1 B 69-70, Tr. 1 B 75:2-16, Tr. 1 B 84-85, Tr. 1 B 91-93, Tr. 1 B 119-120, Tr. 1 B 124:17-25, Tr. 3 22-25. Respondent Huibregtse even agreed that the use of food as punishment is unacceptable from a corrections standpoint. Tr. 2 A 19:1-8.

The court of appeals, by declaring that petitioner had *not* been subjected to punishment, simply appropriated for itself the key factual issue in the case—an issue that the jury found in petitioner's favor. The jury was entitled to find that, despite petitioner's recalcitrant behavior, the prison officials' responsive behavior—to withhold his meals for extensive periods of time—was constitutionally impermissible punishment. Contrary to this Court's precedents, the court of appeals substituted itself for the jury as the finder of fact.

II. The Seventh Circuit's Decision Conflicts With The Decisions Of Other United States Courts Of Appeals On The Same Important Issue.

A. The Seventh Circuit Held Deprivations of Food Including Periods Lasting Eight Consecutive Days Are Not "Sufficiently Serious" to Meet the Objective Component of Petitioner's Eighth Amendment Claim.

While acknowledging that Freeman on at least two occasions missed all meals for at least eight consecutive days, the Seventh Circuit found that there was no evidence of sufficiently serious harm to support his Eighth Amendment claim. After concluding that Freeman did not suffer punishment within the meaning of the Eighth Amendment, the court went on to acknowledge that "[i]t does not follow from anything we have said ... that a prison can allow a prisoner to starve himself to death, or even starve himself to the point at which he seriously impairs his health." Pet. App. 4a–5a. The court of appeals found that "at some point it may have to force-feed the prisoner to prevent him from seriously endangering his health." Pet. App. 5a.

While acknowledging the prison has, at some point, a responsibility to step in, the Seventh Circuit found that even the two undisputed deprivations of eight days straight were *insufficient* to constitute an Eighth Amendment violation, as a matter of law. *Id.* at 6a–7a.

B. Other Federal Appellate Courts Have, In a Variety of Circumstances, Applied the Deliberate Indifference Standard and Found Allegations of Comparable or Lesser Deprivations Maintainable.

Numerous federal appellate courts outside the Seventh Circuit have had occasion to review inmate allegations of food deprivation in various contexts. These courts, unlike the Seventh Circuit, have found that deprivations of food, even partial or for shorter durations than those alleged in the present case, could sustain an Eighth Amendment claim.

1. The Fifth Circuit.

In an analogous case, the Fifth Circuit held that officers had no entitlement to qualified immunity and that the district court should not have dismissed an inmate's allegations of food deprivation be vacated. *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078 (5th Cir. 1991). The inmate in *Cooper* alleged that he was denied meals for thirteen days, twelve of which were consecutive. *Id.* at 1081. The facility at issue had a policy that "all inmates dress fully for all meals" and that if an inmate is not fully dressed and refuses to fully dress, "'he voluntarily rejects the meal.'" *Id.* (citations omitted). The inmate conceded that he refused to dress fully before meals. *Id.* The court held that the mere existence of a regulation "is not an automatic shield against a civil rights suit." *Id.* at 1083. Indeed, although the court recognized that complaints against enforcement of regulations that deprive inmates of certain privileges may, "in the proper circumstances, be dismissed as frivolous," the court noted that "[w]hether, ... a prisoner's meals constitute a like 'privilege' is questionable." *Id.* The court of appeals further found

that deprivation of adequate food is a form of corporal punishment and that, as such, the Eighth Amendment "imposes limits on prison officials' power to so deprive a prisoner." *Id.* Based on the findings, the court of appeals concluded that "Cooper's assertion that he was continuously deprived of food presents a set of facts that may entitle him to relief." *Id.*

The Seventh Circuit, in acknowledging that deprivation of food is an unusual punishment and one that is cruel when it inflicts serious harm on a prisoner, cited another case from the Fifth Circuit, *Talib v. Gilley*, 138 F.3d 211 (5th Cir. 1998). The reasoning in *Talib*, however, directly contradicts the decision reached by the Seventh Circuit. In *Talib*, the Fifth Circuit found that the circumstances—an inmate missing approximately one out of every nine meals for failure to follow a prison rule—did not rise to the level of a constitutional violation. *Id.* However, comparing its case to *Cooper*, the court recognized that there are limits to the deprivations that may be imposed in the name of prison discipline, even where a reasonable rule exists:

> The deprivation of food constitutes cruel and unusual punishment only if it denies a prisoner the "'minimal civilized measure of life's necessities.'" Whether the deprivation of food falls below this threshold depends on the amount and duration of the deprivation. Talib alleges that he missed about fifty meals in five months and lost about fifteen pounds. Missing a mere one out of every nine meals is hardly more than that missed by many working citizens over the same period. We are therefore doubtful that Talib was denied anything close to a minimal measure of life's necessities.

> Our decision in *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078 (1991) requires no less. There, Cooper, a prisoner, alleged that prison officials refused to feed him any food for twelve consecutive days. Given the clearly substantial nature of this deprivation, the court held that "Cooper's assertion that he was *continuously* deprived of food presents a sets of facts that may entitle him to relief." *Id.* at 1083 (emphasis added). Talib, on the other hand, has not alleged a continuous and substantial denial of food, nor does the record support such an inference. Thus, the unique circumstances controlling the *Cooper* case—the complete deprivation of food over an extended period of time—are simply not present in this case.

Talib, 138 F.3d at 214 n.3 (internal citations omitted).

In a more recent case out of the Fifth Circuit, the court applied a similar analysis, again finding that the alleged deprivation was not sufficiently serious and the case properly dismissed. *Berry v. Brady*, 192 F.3d 504 (5th Cir. 1999). In *Berry*, an inmate alleged cruel and unusual punishment on the basis that he was denied eight meals (not, apparently, consecutive) as punishment for his refusal to shave in accordance with institution policy. *Id.* at 506. Even in this context, again analogous to the present case, the court of appeals found that "[t]o establish an Eighth Amendment claim, the prisoner must demonstrate, *inter alia*, an objective component of conditions so serious as to deprive him of the minimal measure of life's necessities, as when denied some basic human need." *Id.* at 507. Noting that the Constitution requires that inmates are provided nutritionally adequate food, the court held that "'[w]hether the deprivation of

food falls below this threshold depends on the amount and duration of the deprivation.'" *Id.* (internal citation omitted). Since the inmate did not allege he was deprived of a nutritionally adequate diet or that he suffered any physical harm other than hunger pains, the court upheld the magistrate judge's finding that the claim was frivolous. *Id.* at 508.

2. The Second Circuit.

The Second Circuit reversed a district court's dismissal of an inmate's complaint that prison officials violated his Eighth Amendment rights by placing him on a nutritionally inadequate diet. *Phelps v. Kapnolas*, 308 F.3d 180 (2d Cir. 2002). The inmate in that case alleged that he was placed on a "restricted diet" consisting of raw cabbage and "bread-like loaf that appeared to contain ground vegetables" for 14 days after being charged with throwing a Styrofoam bowl of cereal. *Id.* at 182. The inmate claimed the restricted diet was nutritionally inadequate. *Id.* (citation omitted). Noting that under this Court's precedents, "prisoners may not be denied 'the minimal civilized measure of life's necessities,'" *id.* at 185, and that under the Eighth Amendment prisoners must not be deprived of their basic human needs, including food, the court found the inmate's allegations that the he was deprived of a nutritionally adequate diet for fourteen consecutive days were "not as a matter of law insufficiently serious to meet the objective requirement." *Id.* at 186. The inmate claimed that, as a result of the inadequate diet, he "lost over thirty pounds, suffered severe abdominal pain, and suffered severe emotional distress, which caused or exacerbated mental illness from which [he] continues to suffer today." *Id.* at 182 (citation omitted).

In an earlier case, the Second Circuit found a complaint by inmates alleging that they were denied adequate meals by an official who refused to feed them on 12 days, three of which were consecutive, within a 53 day period and that the food was contaminated by officials. *Robles v. Coughlin*, 725 F.2d 12, 13 (2d Cir. 1983). Citing, among other things, a district court opinion in which deprivation of food for four days was held unconstitutionally disproportionate punishment for violation of a disciplinary rule, *see Moss v. Ward*, 450 F. Supp. 591, 596-97 (W.D.N.Y. 1978), the Second Circuit held that the combined allegations of food deprivation and food contamination were sufficient to withstand dismissal. *Robles*, 725 F.2d at 15-16.

Notably, the Second Circuit has explicitly rejected the position that conduct does not constitute a violation of the Constitution if an inmate holds the so-called "keys to the cupboard." In a non-food related prisoner case, the Second Circuit held that the court "in no way endorsed the proposition that a prisoner who 'holds the keys to his cell' may be subjected to treatment which would otherwise be impermissible under the Eighth Amendment." *Williams v. Greifinger*, 97 F.3d 699, 705 (2d Cir. 1996).

3. The Tenth Circuit.

In one of the earlier cases dealing with food deprivation, the Tenth Circuit held that it could not conclude, "as a matter of law, that 50 ½ hours of starvation was not cruel and unusual punishment." *Dearman v. Woodson*, 429 F.2d 1288, 1290 (10th Cir. 1970). In *Dearman*, the court set aside an order dismissing the case and remanded the case, holding that, although there were indications that a "riot atmosphere" existed during the time period in question, "we think it is

beyond dispute that a punishment may be cruel and unusual when, although applied in pursuit of legitimate penal aims, it goes beyond what is necessary to achieve those aims." *Id.* The court of appeals further described its analysis of the deprivation, given the purported disciplinary context:

> In *Bethea v. Crouse*, 417 F.2d 504 (10th Cir. 1969), we considered in fair detail the general principles governing prisoner complaints of constitutional deprivations. As we there noted, we are always hesitant to review matters of prison administration. But when the care, treatment or discipline of those confined amount to a clear abuse or caprice on the part of prison officials, we will give cognizance to the complaint. The ultimate issue in the instant controversy poses exactly that question: Were the acts mere discipline in pursuit of quelling a prison disturbance or were they something more which amounted to a clear abuse or caprice, resulting in an infringement of constitutional rights?

Dearman, 429 F.2d at 1290.

4. Other Appellate Courts.

As the decisions of the Seventh, Second, Tenth, and Fifth Circuits indicate, there is a conflict between the Seventh Circuit's holding that a deprivation of hundreds of meals, including two periods lasting at least eight consecutive days, was not, as a matter of law, "sufficiently serious" to meet the objective component of the deliberate indifference test and the rulings by other circuits. Indeed, even where other circuits have found insufficient harm for the case to go forward, the amounts and/or duration of the deprivations have been nothing

close to that of the present case. For example, the Eighth Circuit found that a sandwich diet, lacking fruits and vegetables, might violate the Eighth Amendment if imposed as a regular diet, but that since it was imposed only for nine-day lockdown period implemented in response to a violent and disruptive atmosphere in the prison, it was a "constitutionally permissible response." *Rust v. Grammer*, 858 F.2d 411, 412-14 (8th Cir. 1988).

The Ninth Circuit—in a case involving a uniquely violent inmate who regularly attempted to attack guards or other inmates and, further, threw items out of his cell at guards, including feces, hot water and food—evaluated the inmate's complaint that imposition of a nutraloaf diet for periods up to seven days as a sanction for misbehavior violated his Eighth Amendment rights. *LeMaire v. Maass*, 12 F.3d 1444, 1449-50 (9th Cir. 1993). Acknowledging that the Eighth Amendment requires that "prisoners receive food that is adequate to maintain health," the court found that a Nutraloaf diet was nutritionally adequate and did not meet the threshold required by the objective component described in this Court's *Wilson* decision. *Id.* at 1456. The court found that Nutraloaf, unlike the "grue" discussed in *Hutto v. Finney*, 437 U.S. at 686-87, provided an "excess of nutritional requirements" and further, unlike the inmates in *Hutto* who lost weight, LeMaire actually gained weight on the diet. *LeMaire*, 12 F.3d at 1456.

Thus, in cases outside the Seventh Circuit, courts have acknowledged the deference due to prison officials, but have not found that a disciplinary context eclipses the need to evaluate the amount and duration of the deprivation, just as would be done in any conditions of confinement case. This Court should grant certiorari to mend this divide.

CONCLUSION

The scope of an inmate's right to nutritionally adequate food is an important question of federal law that should be addressed by this Court. The need for this Court to grant certiorari is apparent, given the conflict between the Seventh Circuit's decision in this case and decisions by this Court and other federal appellate courts. For these reasons, petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully Submitted,

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